UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

In re:	§	
	§	
JERRY W. SCARBROUGH	§	**CASE NO. 12-60683-cag**
	§	**Chapter 7**
Debtor	§	
	§	
	§	
	§	
HELEN PURSER, SUE E. PURSER a/k/a SUE E. VAN ZANTEN, GARY W. PURSER, JR., JOANN M. PURSER AND ELIZABETH TIPTON,	§	
	§	
***Plaintiffs*,**	§	
	§	**Adversary Proceeding No. 12-06031**
vs.	§	
	§	
JERRY W. SCARBROUGH	§	
	§	
***Defendant*.**	§	

SECOND AMENDED COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

NOW COME Plaintiffs, Helen Purser, Sue E. Purser a/k/a Sue E. Van Zanten, Gary W. Purser, Jr., JoAnn M. Purser, and Elizabeth Tipton, and file this, their Second Amended Complaint, to determine the dischargeability of debt and, in support thereof, would respectfully show as follows:

JURISDICTION

1. This Court has jurisdiction over the subject matter of this Complaint as a core proceeding pursuant to the provisions of 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (I) and 11 U.S.C. § 523 since this is a proceeding to determine the dischargeability of a particular debt.

PARTIES

2. Plaintiffs (collectively referred to herein as "**Plaintiffs**" or "**Purser Family**") are Helen Purser, Sue E. Purser a/k/a Sue E. Van Zanten, Gary W. Purser, Jr., JoAnn M. Purser, and Elizabeth Tipton.

3. The defendant in this adversary proceeding is Jerry W. Scarbrough (hereinafter referred to as "**Defendant**"), who may be served pursuant to Fed. R. Bankr. P. 7004, by and through his attorney of record, Stephen W. Sather, 1212 Guadalupe, Suite 104, Austin, Texas 78701 or through ECF.

FACTUAL BACKGROUND

4. Defendant, individually and in concert or conspiracy with third parties, incurred debt to the Purser Family by false representations and actual fraud, and by perpetrating willful and malicious injuries upon the Purser Family.

5. Specifically, as alleged in the state court pleadings and during the state court jury trial, Defendant's bad acts include, but are not limited to, the following:

a. Melissa Deaton ("**Deaton**") and Denise Steele ("**Steele**"), individuals who were clients of Defendant, defrauded Gary Purser, Sr. of community property. Defendant then conspired with and aided Deaton and Steele by filing groundless, fraudulent, and harassing state court pleadings against the Purser Family. These groundless, fraudulent, and harassing pleadings were filed in hopes of coercing the Purser Family into settling for millions of dollars.[1] In

[1] In a recorded conversation between Defendant and his wife, which conversation was admitted into evidence in the state court jury trial, Defendant states that he is going to get "a million dollars for every one of them sons of bitches that came in there…Sounds good to me to beat up on them…a million dollars from Elizabeth, a million dollars from Bubba, and a million dollars from JoAnn…."

other words, Defendant, Deaton, and Steele, were conspiring to defraud the Purser Family of additional funds.

b. Defendant then—in furtherance of the conspiracy, in violation of discovery rules, and in violation of Texas law—intentionally failed to preserve and produce evidence proving that Deaton and/or Steele had in fact defrauded Gary Purser, Sr.; that the claims against the Purser Family were completely groundless, fraudulent, and harassing; and that the Purser Family's counterclaims were valid.[2]

c. Further, in efforts to harass, beat down, and defame the Purser Family, Defendant: maliciously instigated, through Deaton, false statements and reports to police that JoAnn Purser was threatening to kill Deaton[3]; maliciously made false statements and reports to Adult Protective Services and others in May of 2011 that the Purser Family had been abusing the elderly Gary Purser, Sr.; maliciously made false statements and reports to various persons—including the director of the funeral home that conducted Gary Purser, Sr.'s funeral[4], a Texas Ranger stationed in Bell County, the Temple Police Department, the Killeen Police Department[5], Bell County Justices of the Peace, and Carolyn Purser Bolling[6]—that the Purser Family had murdered Gary Purser, Sr.[7]; maliciously made false statements and reports to members of the community that Gary Purser, Jr. and JoAnn Purser consumed illegal drugs; and during JoAnn Purser's campaign for a seat on the Killeen School Board, maliciously posted slanderous videos about JoAnn Purser on YouTube, claiming that JoAnn Purser published at least one of the videos herself.

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[2] *See* Spoliation of Evidence, *infra*.

[3] Melissa Deaton made calls to the police on October 3, 2010 falsely stating that JoAnn Purser was threatening to kill her.

[4] Defendant contacted the funeral home while they were in the process of preparing Gary Purser, Sr,'s body for burial.

[5] The Killeen Police Department determined that Defendant's claims that Gary Purser, Sr. was murdered were unfounded because Gary Purser, Sr. died of natural causes.

[6] Carolyn Purser Bolling is a Purser Family cousin who lives in Tennessee. Defendant contacted Ms. Bolling in November 2011.

6. Prior to the commencement of these adversary proceedings, the Purser Family pursued legal action based on the above-referenced facts in the 146th District Court of Bell County Texas, being Cause No. 236,117-B ("**state court action**").

7. On July 28, 2012, this Court entered an Order on the Purser Family's Motion to Modify Stay. Pursuant to such Order, the Purser Family was authorized to proceed to trial in the state court action, which trial was held before a jury the week of September 4, 2012.

8. The Purser Family's Fourth Amended Petition, including all legal and factual allegations set forth therein ("**state court petition**") on file in the state court action at the time of trial is attached and incorporated herein as "**Exhibit A**." Likewise, a true and correct copy of the state court judgment ("**final judgment**") resulting from the trial of the state court action is attached and incorporated herein as "**Exhibit B**."

9. In the state court action, Helen Purser obtained a judgment in the amount of $5,114,261.50, including exemplary damages and discovery sanctions, against Defendant for willful, malicious, and deliberate fraud; and willful, malicious, and deliberate defamation. Post-

[7] In a deposition, Defendant admitted that he had no evidence that Gary Purser, Sr. had been murdered; that his suspicions of murder were based solely upon his own review of Gary Purser, Sr.'s medical records, despite the fact that he had no medical training; and that he had no expert testimony to support his claims that Gary Purser, Sr. had been murdered.

judgment interest continues to accrue on this state court judgment, as set forth in the final judgment.

10. In the state court action, Sue E. Purser a/k/a Sue E. Van Zanten obtained a judgment in the amount of $910,000.00, including exemplary damages, against Defendant for defamation. Post-judgment interest continues to accrue on this state court judgment, as set forth in the final judgment.

11. In the state court action, Gary W. Purser, Jr. obtained a judgment in the amount of $1,575,000.00, including exemplary damages, against Defendant for defamation. Post-judgment interest continues to accrue on this state court judgment, as set forth in the final judgment.

12. In the state court action, JoAnn M. Purser obtained a judgment in the amount of $1,575,000.00, including exemplary damages, against Defendant for defamation. Post-judgment interest continues to accrue on this state court judgment, as set forth in the final judgment.

13. In the state court action, Elizabeth Tipton obtained a judgment in the amount of $1,500,000.00, including exemplary damages, against Defendant for defamation. Post-judgment interest continues to accrue on this state court judgment, as set forth in the final judgment.

14. The state court rendered judgment based on the jury's verdict (hereinafter "**state court verdict**"), which state court verdict was made pursuant to the evidence presented during trial and in response to the questions, instructions, and definitions set forth in the charge of the court. The state court verdict is attached and incorporated herein as "**Exhibit C**."

15. In rendering a verdict on the Purser Family's fraud allegations, the jury found that (1) Defendant made one or more material misrepresentations; (2) with knowledge of its falsity or recklessly without any knowledge of its truth and as a positive assertion; (3) with the intent that it

should be acted on by the Purser Family; and (4) that the Purser Family acted in reliance on the misrepresentation and thereby suffered injury.

16. In rendering a verdict on the Purser Family's fraud allegations, the jury also found that (1) Defendant failed to disclose a material fact within his knowledge; (2) of which he knew the Purser Family was ignorant and did not have an equal opportunity to discover the truth; (3) with the intent to induce the Purser Family to take some action by his failure to disclose such fact; and (4) the Purser Family suffered injury as a result of acting without knowledge of the undisclosed fact.

17. In rendering a verdict on the Purser Family's defamation allegations, the jury also found that Defendant "published alleged factual statement(s) about Helen Purser, Sue Van Zanten, Gary 'Bubba' Purser, Jr., JoAnn Purser, or Elizabeth Tipton which were defamatory, and which statement(s) [he] knew was false or which [he] should have known, in the exercise of ordinary care, was false and had the potential to be defamatory."

18. In rendering a verdict on the Purser Family's defamation per se allegations, the jury found—by clear and convincing evidence—that Defendant "published statement(s) about Helen Purser, Sue Van Zanten, Gary 'Bubba' Purser, Jr., JoAnn Purser, or Elizabeth Tipton which were defamatory per se, and which statements he knew were false or which he made with a high degree of awareness that were probably false, to an extent that he in fact had serious doubts as to the truth of the statement(s)."

19. Further, the jury found that Defendant was grossly negligent as to all harm inflicted on the Purser Family. The jury charge defined "gross negligence" as

> an act or omission by [Defendant], (a) which when viewed objectively from the standpoint of [Defendant] at the time of its occurrence involves an extreme degree

> of risk, considering the probability and magnitude of the potential harm to others; and (b) of which [Defendant] has actual subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

20. The jury not only found that Defendant was grossly negligent as to the harm inflicted on the Purser Family, but also that Defendant's actions were malicious. The jury charge defined "malice" as "a specific intent by [Defendant] to cause substantial injury or harm to Helen Purser, Sue Van Zanten, Gary 'Bubba' Purser, Jr., JoAnn Purser, or Elizabeth Tipton."

21. Defendant is indebted to Plaintiffs per the final judgment and is now seeking a discharge of such indebtedness.

CAUSE OF ACTION PURSUANT TO 11 U.S.C. § 523(a)(2)(A)

22. The allegations set forth in paragraphs 4-21, above, are incorporated herein.

23. Pursuant to 11 U.S.C. § 523(a)(2)(A), a debt will be non-dischargeable if the debtor incurred such debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." For purposes of 523(a)(2)(A), a false pretense or false representation is any (1) knowing and fraudulent falsehood; (2) describing past or current facts; (3) that was relied upon by the other party.[8] Likewise, actual fraud will be found when (1) the debtor made a representation; (2) which the debtor knew was false; (3) which the debtor made with the intent to deceive the creditor; (4) the creditor actually and justifiably relied on the representation; and (5) the creditor sustained a loss as a proximate result of its reliance.[9]

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[8] *In re Borschow*, 467 B.R. 410, 426 (W.D. Tex. 2012).
[9] *In re Acosta*, 406 F.3d 367, 372 (5th Cir. 2005).

24. As set forth in the state court verdict and final judgment, Defendant, acting individually and as a co-conspirator with third parties, perpetrated fraud upon the Purser Family. In short, Defendant lied to and about the Purser Family by making false and embarrassing allegations in the community and in connection with the state court action. All this in an effort to coerce and extort money from the Purser Family. And, when the Purser Family discovered the existence of certain evidence—i.e. secret recordings—that would expose Defendant's claims as groundless, fraudulent, and harassing and confirm their claims against Defendant, Defendant intentionally failed to produce and preserve such evidence. To their detriment, the Purser Family relied on the fraudulent misrepresentations about these potential claims—expending significant resources to investigate such claims. Also to their detriment, the Purser Family relied on the fraudulent misrepresentations regarding the existence (or non-existence) of evidence—expending significant resources to confirm or dispel the existence (or non-existence) of such evidence. Defendant's misrepresentations caused the Purser Family both economic and noneconomic injuries, as awarded in the state court verdict. Based on the foregoing, the debt owed to the Purser Family is nondischargeable under section 523(a)(2)(A) of the Bankruptcy Code.

CAUSE OF ACTION PURSUANT TO 11 U.S.C. § 523(a)(6)

25. The allegations set forth in paragraphs 4-24, above, are incorporated herein.

26. Pursuant to 11 U.S.C. § 523(a)(6), a debt will be non-dischargeable if the debtor incurred such debt as the result of "willful and malicious injury by the debtor to another entity or to the property of another entity." An injury is "willful and malicious" where there is either "an objective substantial certainty of harm or a subjective motive to cause harm."[10]

[10] *Matter of Miller*, 156 F.3d 598, 606 (5th Cir. 1998).

27. As set forth in the state court verdict and final judgment, Defendant, acting individually or as a co-conspirator with third parties, willfully and maliciously injured the Purser Family by fraud, fraud by nondisclosure, defamation, and defamation per se. Specifically, the final judgment orders that Helen Purser have "judgment and recover from Jerry Scarbrough, Melissa Deaton and Denise Steele, jointly and severally, in the amount of $3,060,000.00, in connection with the (i) damages referable to *willful, malicious and deliberate* defamation while acting in concert, and (ii) damages referable to *willful, malicious and deliberate* fraud while acting in conspiracy."[11]

28. Defendant's fraudulent actions include, but are not limited to, as set forth above: making false and embarrassing demands and allegations related to the state court action; making groundless, fraudulent, and harassing claims in the state court action in an attempt to coerce a multimillion-dollar settlement from the Purser Family—and then lying about the secret recordings; falsely reporting that the Purser Family had been abusing Gary Purser, Sr.; and falsely reporting that the Purser Family had murdered Gary Purser, Sr.

29. Defendant's defamatory statements and actions include, but are not limited to, as set forth above: false statements and reports that JoAnn Purser was threatening to kill Deaton; false statements and reports that the Purser Family had been abusing the elderly Gary Purser, Sr.; false statements and reports that the Purser Family had murdered Gary Purser, Sr.; false statements and reports that Gary Purser, Jr. and JoAnn Purser consumed illegal drugs; and the posting of slanderous videos about JoAnn Purser on YouTube and the misrepresentations related thereto.

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[11] Final Judgment, pages 4-5.

30. Defendant's above-referenced actions resulted in substantial willful and malicious injury to the Purser Family. Based on the foregoing, the debt owed to the Purser Family is nondischargeable under section 523(a)(6) of the Bankruptcy Code.

COLLATERAL ESTOPPEL/ISSUE PRECLUSION

31. The allegations set forth in paragraphs 4-30, above, are incorporated herein.

32. State court judgments, which are final, should generally be given full faith and credit by bankruptcy courts for the purposes of collateral estoppel.[12] When a bankruptcy court gives full faith and credit to a state court judgment, the bankruptcy court must apply the rules of preclusion from that state in the bankruptcy case.[13] In this case, because the final judgment was rendered by a Texas court, Texas rules of preclusion are applicable.[14]

33. Under the doctrine of collateral estoppel, Defendant should not be allowed to re-litigate in the bankruptcy court any matter relating to the final judgment rendered in the state court action—including, but not limited to, the issues of fraud, fraud by nondisclosure, defamation, defamation per se, and malice.[15] All such matters have already been subject to a judicial determination, as set forth above.

34. Specifically, the facts relevant to Plaintiffs' 523(a)(2)(A) and (a)(6) claims of nondischargeability were essential to the final judgment and were fully and fairly litigated in the

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[12] *See, e.g.*, *Grogan v. Garner*, 498 U.S. 279 (1990).

[13] *Matter of Miller*, 156 F.3d at 601.

[14] A party seeking to invoke the doctrine of collateral estoppel in Texas must prove that (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action. *Bonniwell v. Beech Aircraft Corp.,* 663 S.W.2d 816, 818 (Tex. 1984).

[15] *See Grogan*, 498 U.S. 279.

state court action, and the Purser Family and Defendant were cast as adversaries in the state court action.

35. Further, the standards used to assess Defendant's tortious actions are the same as those standards applicable under sections 523(a)(2)(A) and (a)(6) of the Bankruptcy Code.[16]

36. As discussed above, the finding that Defendant committed one or more acts of fraud was based on determinations that (1) Defendant made one or more material misrepresentations; (2) with knowledge of its falsity or recklessly without any knowledge of its truth and as a positive assertion; (3) with the intent that it should be acted on by the Purser Family; and (4) that the Purser Family acted in reliance on the misrepresentation and thereby suffered injury. This state court standard is the same as the standard for fraud used under section 523(a)(2)(A) of the Bankruptcy Code.[17]

37. Also, as discussed above, the finding that Defendant's fraud, fraud by misrepresentation, defamation, and defamation per se were perpetrated with malice was based on determinations that Defendant acted with "a specific intent…to cause substantial injury or harm to Helen Purser, Sue Van Zanten, Gary 'Bubba' Purser, Jr., JoAnn Purser, or Elizabeth

[16] "An important aspect of determining whether a previously litigated matter has collateral estoppel effect is the identity of that matter with the issue currently before the court."[1] (Footnote 1 – "Not only the facts, but also the legal standard used to assess them, must be identical."). *Brister v. A.W.I., Inc.*, 946 F.2d 350, 354 (5th Cir. 1991).

[17] *In re Acosta*, 406 F.3d 367, 372 (5th Cir. 2005) (The creditor must show (1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance.).

Tipton...."[18] This state court finding satisfies the standard for willful and malicious injury under section 523(a)(6) of the Bankruptcy Code.[19]

SPOLIATION OF EVIDENCE

38. The allegations set forth in paragraphs 4-37, above, are incorporated herein.

39. As referenced above, secret audio recordings were made in the course of Deaton and Steele's acts to defraud the Purser Family.[20] These recordings, which were made before Defendant's demands and claims against the Purser Family, proved that Deaton and/or Steele had in fact defrauded Gary Purser, Sr.; that the claims against the Purser Family were groundless, fraudulent, and harassing; and that the Purser Family's claims were valid.[21] Given the nature of Deaton and Steele's claims against the Purser Family, Defendant knew that the recordings were highly relevant to the state court action and were discoverable witness statements to be preserved under applicable law. There was no evidence to replace the secret recordings destroyed by Defendant, and the Purser Family had to expend significant resources to expose Defendant's scheme through trial. The resulting state court charge (reduced to the final judgment) included a spoliation presumption to alleviate the resulting prejudice against the Purser Family.

40. Notwithstanding the state court spoliation presumption, the prejudice against the Purser Family continues to exist in these adversary proceedings—as Defendant has destroyed evidence which would be dispositive of the Purser Family's 523(a)(2)(A) and (a)(6) claims.

[18] *Matter of Miller*, 156 F.3d 598, 606 (5th Cir. 1998) ("An injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm.").
[19] *See Matter of Miller*, 156 F.3d at 606.
[20] *See* State Court Petition, p. 7.
[21] State Court Petition, p. 7-8.

Accordingly, Plaintiffs request an adverse inference be imposed that the destroyed evidence is unfavorable to Defendant.

EXEMPLARY DAMAGES, SANCTIONS, INTEREST, ATTORNEY'S FEES, AND COSTS OF COURT

41. The allegations set forth in paragraphs 4-40, above, are incorporated herein.

42. Any debt incurred by fraud and/or willful and malicious injury–including punitive/exemplary damages, legal fees, costs of court, and interest—is non-dischargeable.[22] Because the punitive/exemplary damages (including sanctions), legal fees, costs of court, and interest assessed against Defendant in the state court actions were incurred by Defendant as a result of his fraudulent and willful and malicious actions, the punitive/exemplary damages (including sanctions), legal fees, costs of court and interest imposed against Defendant in the state court action should not be discharged.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, the Purser Family, pray that:

a. The Court find that the debt owed to Helen Purser in the amount of $5,114,261.50 is nondischargeable;

b. The Court find that the debt owed to Sue E. Purser a/k/a Sue E. Van Zanten in the amount of $910,000.00 is nondischargeable;

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[22] *Cohen v. de la Cruz*, 523 U.S. 213, 223 (1998) ("'any debt…for money, property, services, or… credit, to the extent obtained by' fraud encompasses any liability arising from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor."); *see also Stokes v. Ferris*, 150 B.R. 388, 393 (W.D. Tex. 1992) *aff'd sub nom. Matter of Stokes*, 995 F.2d 76 (5th Cir. 1993) ("All debts, including statutorily computed punitive damages, legal fees, and interest, are nondischargeable under Section 523(a)(6).").

c. The Court find that the debt owed to Gary W. Purser, Jr. in the amount of $1,575,000.00 is nondischargeable;

d. The Court find that the debt owed to JoAnn M. Purser in the amount of $1,575,000.00 is nondischargeable;

e. The Court find that the debt owed to Elizabeth Tipton in the amount of $1,500,000.00 is nondischargeable;

f. The Court enter a judgment of nondischargeability;

g. The Court award Plaintiffs pre-judgment and post-judgment interest; and

h. The Court award such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

HALEY & OLSON, P.C.

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CERTIFCIATE OF SERVICE

I certify that on February 19, 2013, a true and correct copy of the above and foregoing was served upon the following parties via electronic means as listed on the court's ECF noticing system or by regular first class mail:

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/s/ Joshua J. White
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